No. 10,950

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

Appeal From the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

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Appeal From the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

STATEMENT OF CASE.

This is an appeal from the action of the District Court upon judicial review of a compensation order filed on February 24, 1944, by the Deputy Commissioner Warren H. Pillsbury, appellee herein, in which he awarded compensation to William Donoho for disability from tuberculosis resulting from his employ-

ment by Contractors, PNAB, appellant, in the Samoan Island. The compensation liability was insured by the appellant, Liberty Mutual Insurance Company. The said compensation order was issued by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U.S.C., Title 33, Ch. 18, sec. 901, *et seq.*), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941. (55 Stat. 622; 42 U.S.C.A. secs. 1651-1654.)

William Donoho (hereafter called "claimant") left the United States in February 1942, for the Samoan Island and was employed there from March 1942, to September 1942. When he returned to the United States he was ill, and it was ascertained that he suffered from tuberculosis. He filed claim for compensation claiming that his condition was due to his employment. The employer and carrier controverted the claim upon the ground that the condition did not arise out of and in the course of the employment. A hearing was held before the deputy commissioner on October 6, 1943, at which both sides offered evidence with respect to said issue. Upon the evidence adduced before him, the deputy commissioner issued the compensation order of February 24, 1944 (complained of), in which he found that the condition was caused or activated by the employment.

The employer and carrier thereupon instituted a proceeding to review the compensation order pursuant to the provisions of section 21(b) of the Longshore-

men's Act (33 U.S.C.A. sec. 921(b)), alleging in substance that the compensation order is not in accordance with law because there was no evidence to support the finding that claimant contracted tuberculosis as a result of his employment.

A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The cause came on for a hearing before Honorable A. F. St. Sure, United States District Judge for the Northern District of California, Southern Division, who by order and judgment dated and filed on September 13, 1944, granted the motion and dismissed the complaint. It is from this order that the present appeal is taken.

ARGUMENT.

I.

THE FINDING OF FACT OF THE DEPUTY COMMISSIONER TO THE EFFECT THAT THE EMPLOYEE SUSTAINED A COMPENSABLE INJURY, IS SUPPORTED BY EVIDENCE, AND THUS SUPPORTED, IS FINAL AND CONCLUSIVE.

(a) General Principles.

Before proceeding to indicate the evidence which supports the finding of the deputy commissioner, it may not be inappropriate to invite the Court's attention to the following well established principles of compensation law:

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelhpia Steamboat Co. v. Norton, deputy commissioner,* 284 U. S. 408 (1932);

Fidelity & Casualty Co. of New York v. Burris, 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D. C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U. S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D. C. Wash. 1931); *United Employees Casualty Co. v. Summerous,* 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D. C. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 F. Supp. 75 (D. C. N. D. W. Va. 1943).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Liberty Mutual Ins. Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner,* 56 F. (2d) 200 (D. C. Mich. 1929); *Del Vecchio v. Bowers,* 296 U. S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy*

commissioner, et al., 21 F. Supp. 535 (D. C. Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (D. C. N. Y. 1938); *Simmons v. Marshall, deputy commissioner,* 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, deputy commissioner,* 63 App. D. C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the Court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D. C. 52, 89 F. (2d) 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N. W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S. W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.,* 161 N. E. 115, 329 Ill. 623 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N. W. 249 (1930). Compare also: *Bassett, deputy commissioner v. Massman Construction Company,* 120 F. (2d) 230 (C.C.A. 8, 1941), cert. denied 62 S. Ct. 92.

An "accidental injury" includes an injury which is unexpected and not designed, and just as much includes injury sustained by an employee subject to physical infirmities as injury to one who is strong and robust; such injury may occur notwithstanding the injured employee is then performing his usual and ordinary work: *Commercial Casualty Insurance Co., et al. v. Hoage, deputy commissioner, et al.,* 64 App. D. C. 158, 75 F. (2d) 677, certiorari denied 295 U. S. 733; *Hoage, et al. v. Employers' Liability Assurance Corp., Ltd.,* 62 App. D. C. 77, 64 F. (2d) 715, certiorari denied 290 U. S. 637; *Hoage, deputy commissioner, et al. v. Royal Indemnity Company, et al.,* 67 App. D. C. 142, 90 F. (2d) 387, certiorari denied 302 U. S. 736.

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U. S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943).

(b) The Material Finding of Fact Is Supported by Evidence.

The following is a reference to so much of the testimony taken at the hearing before the deputy com-

missioner as is considered sufficient to show that the complained of finding of fact of the deputy commissioner is supported by evidence. This reference is not intended to cover all the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

William Donoho, claimant, whose testimony was taken at Olive View Sanitarium, testified in part as follows: That he was in the employ of Contractors, Pacific Naval Air Bases, at the island base from March, 1942 to September, 1942; that he first worked as a male nurse at the first aid station (R. 30), and then drove a truck for hauling dirt; that he never had tuberculosis before to his knowledge, and that he first began to feel ill about two or three months after his arrival; that he felt fatigue, constant fatigue; that his condition was first diagnosed as tuberculosis upon his examination by the draft board, February 2, 1943 (R. 31); that he arrived back in the States in September, 1942; that he did not do any work between the time he arrived back in the States and the time when his condition was diagnosed as tuberculosis, because of the fatigue which he felt; that he does not believe he would have been able to do a day's work in that period; that he had been examined by the Navy before he left for work on the island and they found him free of tuberculosis; that the Navy's examination included a fluoroscope examination (R. 32, 33, 46); that the weather conditions on the island were very bad in the rainy season; that it rained four or five times a

day and when he was driving the truck, the equipment was such that he got soaked every time it rained; that after his job of driving a truck, he worked as steward and that he worked twelve hours a day and sometimes sixteen to eighteen hours a day; that his work as steward included going over to the hospital once a day to a patient who was isolated with the measles to see if he wanted anything; that he worked over 12 hours a day for four months, towards the end, and it was then he began to feel more fatigued (R. 34, 35); that the temperature was from 90 to 100 degrees with very high humidity; that the natives on the island worked in the mess hall handling the food; that tuberculosis among the natives might be common and some of them were taken ill; that one of the other employees, Bob Breman, working with them, is now in a tuberculosis hospital with a condition diagnozed as tuberculosis; that he, claimant, came in contact with him going over on the boat, and that Breman drove a truck the same as the claimant, and that he also came in contact with him in the mess hall and on casual visits (R. 36, 37); that there was still another employee, whose condition claimant understood was diagnosed as tuberculosis, by the name of Forbes; that claimant came in contact with him in his cabin and also in the mess hall; that claimant heard that several others broke down (R. 38); that the rainy season lasted approximately from April to August on the island (R. 39); that the truck which he drove had a cab but no doors (R. 41); that none of his family that he knows of has had tuberculosis. (R. 46.)

Dr. James B. Ford, Jr., testified in part as follows: That he is a physician and surgeon licensed in California, a graduate of Duke University, and is resident physician at the Olive View Sanitarium; that claimant's diagnosis is far advanced pulmonary tuberculosis (R. 47); that the condition could definitely have developed since March, 1942, and that fatigue is a very common symptom of tuberculosis; that the x-ray showed that claimant had a mixed type, showing some active and some healed tuberculosis together; that he is unable to state whether it is a condition of primary tuberculosis starting about the summer of 1942, or whether it is a reactivation or acceleration of an earlier condition; that with exposure to disease, long working hours and in bad weather would tend to lower the general physical condition of a patient and would have influence upon the development of the disease; that it is possible to contract tuberculosis through casual contact with individuals (R. 48, 49); that in view of the whole history, it is more likely that the disease started at the time his fatigue started (R. 51); that it is quite possible for the disease to develop as far as it has in the claimant in a period of six months (R. 52); that when a patient has tuberculosis any type of endeavor is contraindicated (R. 53); that tuberculosis seems to be of a more virulent type in the tropics; that it is possible for the tuberculosis bacillus to be transferred from person to plate and from plate to another person in the mess hall; that the disease can be transferred from a diseased person to a well person without actual contact between the two. (R. 54, 55).

(c) Finality of the Determination of Fact.

It will be seen from the above testimony that the finding of fact of the deputy commissioner in the compensation order complained of to the effect that claimant's disability was causally related to his employment is supported by the evidence, and thus supported is final and conclusive: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U. S. 251 (1940); *Del Vecchio v. Bowers,* 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U. S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U. S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U. S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Marshall, deputy commissioner v. Pletz,* 317 U. S. 383 (1943).

The deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner,* 18 F. Supp. 729 (D.C. N.Y. 1937); *Joyce v. United States Deputy Commissioner,* 33 F. (2d) 218 (D. C. Me. 1929); *Jarka Corporation of Philadelphia v. Norton, deputy commissioner,* 56 F. (2d) 287 (D.C. Penn. 1930); *E. S. Booth v. Monahan, deputy commissioner,* 56 F. (2d) 168 (D. C. Me. 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall, deputy commissioner,* 42 F. (2d) 1010 (D.C. Wash. 1930); *Baltimore & Ohio R. R. Co. v. Clark, deputy com-*

missioner, 56 F. (2d) 212 (D.C. Md. 1932); *Ryan Stevedoring Co., Inc., et al. v. Norton, deputy commissioner, et al.,* 50 F. Supp. 221 (D.C. E.D. Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall, deputy commissioner,* 57 F. Supp. 177 (D.C. W.D. Wash N.D. 1944).

Evidence of casual relationship need not be positive and unequivocal to support an award of compensation. *Travelers Insurance Company v. Norton, deputy commissioner,* 43 F. Supp. 531 (D.C. E.D. Pa. 1942).

Where a deputy commissioner has determined a disputed question of fact the reviewing court will not substitute its judgment for that of the deputy commissioner nor reweigh the evidence: *Lumber Mutual Casualty Insurance Company v. Locke, deputy commissioner,* 60 F. (2d) 35 (C.C.A. 2, 1932); *Steamship Terminal Operating Corp. v. Schwartz, deputy commissioner,* 140 F. (2d) 7 (C.C.A. 2, 1944); *Groom v. Cardillo, deputy commissioner,* 119 F. (2d) 697 (App. D.C. 1941); *Henderson, deputy commissioner v. Jones,* 110 F. (2d) 952 (C.C.A. 5, 1940); *Fidelity and Casualty Company v. Henderson, deputy commissioner,* 128 F. (2d) 1019 (C.C.A. 5, 1942); *Southern Steamship Co. v. Norton, deputy commissioner,* 101 F. (2d) 825 (C.C.A. 3, 1939); *Luckenbach Gulf Steamship Co. v. Henderson, deputy commissioner,* 133 F. (2d) 305 (C.C.A. 5, 1943); *Henderson, deputy commissioner v. Pate Stevedoring Co.,* 134 F. (2d) 440 (C.C.A. 5, 1943); *Marshall, deputy commissioner v. Pletz,* 317 U. S. 383 (1943); *Norton, deputy commissioner v. Warner,* 321 U. S. 565 (1944).

(d) Claimant Sustained "Injury" Within Meaning of Act.

The term "injury" is defined in section 2 (2) of the Longshoremen's Act (33 U.S.C.A. sec. 902 (2)) as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

The Longshoremen's Act is one of the most liberal compensation laws in the United States in respect to the definition of the term "injury". It is more liberal in this respect that the New York workmen's compensation law (prior to its amendment) upon which the Longshoremen's Act was largely modeled, in that the term "injury" in the Longshoremen's Act includes "such occupational disease or infection as arises naturally out of such employment". *Todd Dry Docks, Inc., et al. v. Marshall, deputy commissioner, et al.,* 61 F. (2d) 671 (C.C.A. 9, 1932). In the present case the deputy commissioner found in effect that the conditions which claimant encountered in the course of his employment caused or reactivated the condition of tuberculosis. Diseases, whether from a fresh infection or the awakening of an old one, resulting from conditions of employment are considered injuries within the meaning of the law. *Lea Mathew Shipping Corporation, et al. v. United States Employees' Compensation Commission, et al.,* 56 F. (2d) 860 (D.C.

W.D. Wash. 1930) (bronchiestasis); *Hoage, deputy commissioner, et al. Employers' Liability Assurance Corporation, Ltd.,* 64 F. (2d) 715 (App. D.C. 1933), cert. den. 54 S. Ct. 54; *Hoage, deputy commissioner, et al. v. Royal Indemnity Co., et al.,* 90 F. (2d) 387 (App. D.C. 1937); *Bishop v. Comer and Pollock, Inc.,* 297 N.Y.S. 946, 251 App. Div. 492 (1937) (tuberculosis); *Tweten v. North Dakota Workmen's Compensation Bureau,* 69 N. D. 369, 287 N. W. 304 (1939) (pneumonia); *Andreason v. Utah Industrial Commission,* 98 Utah 551, 100 P. (2d) 202 (1940) (bacillus enteriditis); *DeStefano v. Alpha Lunch Co.,* 308 Mass. 38, 30 N. E. (2d) 827 (1941) (trichinosis); *Union Mining Co. v. Blank* (not reported in State reports), 28 A. (2d) 568 (Md. 1943) (typhoid fever); *Arquin v. Industrial Commission,* 349 Ill. 220, 181 N. E. 613 (1932) (epidemic meningitis). Even the California State Courts have at times recognized that the term "injury" may include disease. In the case of *Casserly v. City of Oakland,* 215 Cal. 600, 12 P. (2d) 425 (1932), the Court said:

> "The words 'injury' and 'killed', as used in the charter, and similar provisions which provide for compensation in cases of this character are not limited in their interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the words are commonly used and understood, but they are given a much broader and liberal meaning. So construed, they include any injury or disease arising out of and in the course of employment, which causes incapacity or death. The word 'injury' has reference not to some break in some

part of the body or some wound thereon, or the like, but rather to consequences or disability that result therefrom. Courts are practically unanimous in holding that the words should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized. Such legislation should be applied fairly and broadly, with a view to confer the benefits intended."

In the case of *Grain Handling Co., Inc., et al. v. McManigal, et al.,* 23 F. Supp. 748 (D.C. W.D. N.Y. 1938) aff'd. 102 F. (2d) 464, cert. den. 308 U. S. 570, which arose under the Longshoremen's Act (the same Act involved in the instant case), the employee sustained an aggravation of a preexisting condition of tuberculosis from the inhalation of grain dust. From an award of compensation made to the claimant, the employer appealed to the United States District Court and from the decision of that Court affirming the award, to the United States Court of Appeals for the second circuit. The court stated:

"The undisputed evidence is that claimant is suffering from pulmonary tuberculosis. The claimant testified to physical conditions commencing in June, 1934, which are symptoms of active tuberculosis. Three physicians, both from physical examinations and X-rays, testified to conditions showing a probable dormant pulmonary tuberculosis of long standing. * * *

"The law is well settled that the word 'injury' as used in the statute includes any aggravation or activation of a previous condition, providing it can be said that such aggravation naturally arose

out of the employment. Lea Mathew Shipping Corp. v. U. S. Employees' Compensation Commission, D. C., 56 F. 2d 860; Hoage, Comm'r v. Employers' Liability Assur. Corp., 62 App. D. C. 77, 64 F. 2d 715; Southern Shipping Co. v. Lawson, D. C., 5 F. Supp. 321.

* * * * * * *

"Attention has been called to several cases in the federal courts in which awards made for disabilities from diseases which did not naturally arise out of the occupation but arose during the employment were sustained. Types of these are: Todd Dry Docks, Inc. v. Marshall, 9 Cir., 61 F. 2d 671, in which an employee on shipboard contracted meningitis from passengers on board; Hoage v. Royal Indemnity Co., 67 App. D. C. 142, 90 F. 2d 387, 391, in which an employee suffered angina pectora caused by overwork; Hoage v. Employers' Liability Assur. Corp., 62 App. D. C. 77, 64 F. 2d 715, in which amputation of leg was made necessary as a result of exposure to intense cold; Commercial Casualty Ins. Co. v. Hoage, 64 App. D. C. 158, 75 F. 2d 677, in which disability arose from heavy work; Southern Shipping Co. v. Lawson, D. C., 5 F. Supp. 321, where disability resulted from a rupture; and Baltimore & O. R. Co. v. Clark, Com'r, 4 Cir., 59 F. 2d 595, 599, where there was disability from heat prostration. Some of these awards were clearly allowable on the theory of 'accidental injury.' Todd Dry Docks, Inc. v. Marshall, supra, is a broad interpretation of the statute. It was there held that infections need not be 'occupational' provided 'disability' arose naturally out of the employment."

In the case of *Lockheed Overseas Corporation, et al. v. Pillsbury, deputy commissioner, and Robert B. Strand,* 52 F. Supp. 997 (D.C. S.D. Cal. 1943), it was held that an employee who became disabled by the development of active tuberculosis, caused or exacerbated into activity by the condition of his employment, was entitled to compensation under the so-called Defense Bases Act,—the same Act as was applied in the present case.

Appellants' contention, in substance, that disability resulting from an infection, such as tuberculosis, is not compensable under the Longshoremen's Act unless the infection is peculiar to the particular occupation, is not supported by the authorities cited in the above opinion, particularly the case of *Todd Dry Docks, Inc. et al. v. Marshall, deputy commissioner, et al.,* 61 F. (2d) 671, decided by this Honorable Court on November 7, 1932. In that case the employee died from spinal meningitis which the deputy commissioner found had been contracted while the employee was working on board a vessel where there were several cases of that disease. With reference to the contention of the employer and carrier, this Honorable Court stated:

> "Their contention is that the infection must be an *occupational one;* that is, that the phrase of the section (33 USCA sec. 902, subd. (2) dealing with disease should be construed as though it read, 'and such occupational diseases or [occupational] infection as arise naturally out of such employment.' We see no reason for thus limiting the plain language of the act, nor is it at all clear

that the suggested addition of the qualifying word 'occupational' to the word 'infection' would affect the result. Appellants state, 'No one contends that cerebrospinal meningitis is an occupational disease.' This, however, does not meet the situation at all. It is a fundamental canon of construction that all the words of a statute should be given some significance, and to hold that 'occupational disease' and 'infection' or 'occupational infection' are synonymous would in effect strike out of the statute the words 'or infection.' It would seem clear that the injury which resulted in the death of the employee was either an 'accidental' injury as defined by the act, or an infection arising naturally out of the employment.

"The Appellate Court of Indiana, in dealing with the subject of disease as an injury by accident within the meaning of that phrase as used in the Workmen's Compensation Laws, in the case of United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276, 277, said:

" 'The courts have also differed as to whether a disease following an employment should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial

or occupational diseases are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a disease, which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provisions of acts providing for compensation for personal injury so caused.'

"If we accept the definitions thus suggested by the Appellate Court of Indiana, it follows that, if the 'infection' was a result naturally and reasonably to be expected from the decedent's occupation, it was not compensable as an accidental injury, but it would follow also that it was an 'occupational infection'. On the other hand, if we assume it was not reasonably and naturally to be expected, the disease, thus resulting from 'unusual circumstances', would be an 'accidental' injury within the meaning of that term as defined by the Appellate Court of Indiana in the excerpt above quoted. We do not, however, wish to be understood as implying our acceptance of appellants' contention that the statute limits compensable infection to 'occupational infection', except to the extent that such limitation is contained in the qualifying words of the statute, 'infection as arises naturally out of such employment'. *We are satisfied that the death of the employee in the case at bar resulted from an infection arising naturally out of such employment, and that Congress employed the phrase under discussion to set*

at rest the question which had been considered by the courts as to whether or not such an infection was the result of an accident or was an accidental injury compensable under the workmen's compensation laws. Arquin v. Industrial Comm., 349 Ill. 220, 181 N. E. 613, decided June 24, 1932, where a hospital interne contracted meningitis. See, also, our decision in Sullivan Mining Co. v. Aschenbach, 33 F. (2d) 1, applying the Workmen's Compensation Law of Idaho to a case of a painter poisoned by carbon disulphide fumes from a paint thinner. See, also, Industrial Comm. v. Roth, 98 Ohio St. 34, 120 N. E. 172, 6 A. L. R. 1463, to the same effect as to fumes arising from respects under consideration differs from the New York Compensation Law (Consol. Laws, c. 67), from which, in the main, our Longshoremen's and Harbor Workers' Act is taken." (Emphasis supplied.)

"The question is not concluded by the decisions of the New York courts, because the statute in the hot paint.

Compare *Aetna Life Insurance Company v. Portland Gas & Coke Co.,* 229 F. 552, 553, L.R.A. 1916D, 1027, where this Honorable Court held that the contracting of typhoid fever from drinking water furnished by the employer was a bodily injury accidentally suffered. Compare also *Dansky v. Cardillo, deputy Commissioner,* 40 F. Supp. 336 (D.C. 1941), involving a claim for tuberculosis under the Longshoremen's Act as applied to employment in the District of Columbia. See, also, the following cases in which tuberculosis resulting from the conditions of employment was con-

sidered a compensable injury: *Yearich v. Roosevelt Hospital, et al.,* 37 N.Y.S. (2d) 149 (1942); *Dixie Ice Cream Co. v. Ingels, et al.,* 291 Ky. 39, 163 S. W. (2d) 20 (1942); *Milwaukee County v. Industrial Commission,* 272 N. W. 46 (Wisc. 1937).

Appellants refer to Campbell, Workmen's Compensation, Volume I, paragraph 350, in support of their contention that the infection must be peculiar to the occupation engaged in by the employee to be compensable. The conditions referred to at that place obviously are *occupational diseases* (not infections), such as lead poisoning, silicosis, glass blower's arm; occupational neuritis, etc. Campbell apparently recognizes the distinction for he earlier (par. 331, et seq.) devotes considerable space to so-called "infectious diseases", and in connection with them he does not state that an infectious disease must be peculiar to the particular occupation, and he cites the *Todd Dry Docks* case, *supra,* as authority that disability resulting from an infectious disease constitutes a compensable injury.

Appellants cite several decisions in the California State courts construing the California workmen's compensation law, which are stated as supporting their contention "that there must be a special exposure to the disease. In other words, the incidence of the disease must be greater among men engaged in the particular occupation than among the people in general in the commonalty in which the labor is performed."

It is submitted, first, that the definition of "injury" in the Longshoremen's Act is not the same as in the California statute; the definition of "injury" in the compensation law of California does not include "infections" as the Longshoremen's Act does; second, even though the provisions of the two statutes were similar, the decisions of the State jurisdiction under the State Act would not be controlling upon the Federal courts in the construction of the Federal statute; third, insofar as the decisions construing the California law hold that a risk resulting in injury to be compensable must constitute a special exposure, that is, one which is greater than that to which the general public is exposed, they are contrary to the weight of authority. This is the old "commonalty doctrine."

In the early administration of compensation laws some of the states adopted what was then referred to as the "commonalty doctrine." Under such doctrine it was deemed necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general was subjected. This doctrine led to so many injustices that it has been repudiated wherever critical judicial inquiry into all of its aspects has been made. Such doctrine has *not* been adopted in decisions arising under the Longshoremen's Act. The doctrine was specifically rejected by the United States Circuit Court of Appeals for the fourth circuit in the leading case of *Baltimore and Ohio R. R. Co. v. Clarke, deputy commissioner,* 59 F. (2d) 595, and under the same Act which is before this Court. In that case the Court said:

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of and in the course of employment.' 33 USCA sec. 902. *It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute.* A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." (Emphasis supplied.)

Such doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, deputy commissioner,* 62 F. (2d) 468, which arose under the Longshoremen's Act as applied in the District of Columbia,—the same Act as is before this Court. The Court in that case said that:

> "In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not 'arise out of' the workmen's

> employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned.*" (Emphasis supplied.)

In the case of *Aetna Life Insurance Co. v. Hoage, deputy commissioner,* 63 F. (2d) 818, the appellant attempted to invoke the old "commonalty doctrine" in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general. In the *Aetna Life Insurance Company* case the court definitely reaffirmed the position previously taken in the *New Amsterdam Casualty Company* case, *supra,* by holding that:

> "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is *whether the employment exposes the employee to the risk.*" (Emphasis supplied.)
>
> Cf. *Hartford Accident & Indemnity Co. v. Cardillo, deputy commissioner,* 112 F. (2d) 11 (1940) cert. den. 310 U. S. 649.

In *Matter of Katz v. Kadans & Co.,* 232 N.Y. 420, 134 N. E. 330, the court said:

> "But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. *The question is whether the employment exposed the workmen*

to the risks by sending him onto the street, common though such risks were to all on the street." (Emphasis supplied.)

Cf. *Lepow v. Lepow Knitting Mills,* 288 N. Y. 377, 43 N. E. (2d) 450 (1942); *Stilwell v. Aberdeen-Springfield Canal Co.,* 61 Ida. 357, 102 P. (2d) 296 (1940); *Burroughs Adding Machine Co. v. Dehn,* 110 Ind. App. 493, 39 N. E. (2d) 499 (1942).

In *Burroughs Adding Machine Co. v. Dehn, supra,* 110 Ind. App. 483, 39 N. E. (2d) 499, the court said:

"Many of the limitations upon the granting of compensation under the Act are judicial inventions wholly unjustified by the language of the Act or the humane purposes of the legislation in enacting it. There is nothing in the language of the Act that requires an employee's injury by accident to arise out of the *nature* of the employment, nor is there anything in the language of the Act that requires the risk to which the employee is subjected to be different from the risk to which the general public in the community is subjected. These limitations to the granting of compensation are but judicial accretions to the language of the Act."

Appellants have devoted four pages of their brief to quote from the case of *Hartford Accident & Indemnity Company v. Industrial Accident Commission,* 140 Cal. App. 432, 35 P. (2d) 366. In view of the importance which they apparently attach to this decision we believe it advisable to comment upon it more

particularly. In addition to the unappropriateness of decisions under the California workmen's compensation law due to the fact that said law does not cover "infections" as does the Longshoremen's Act, there are several material differences between that case and the instant case, as a reference to the part quoted by appellants will show. In that case the employee based his claim for compensation for tuberculosis upon exposure during eight hours of daily work as shipping clerk to extremes of heat and cold, smoke, ammonia gas and inclement weather. The remainder of the day, 16 hours, he spent away from the place of employment. He offered no proof of possible contact with the germ upon the job. He offered no medical evidence of casual relationship between his employment and the condition; on the other hand, two physicians for the employer and carrier testified that in their opinion there was no such relationship. Under these circumstances, the Court, after reciting the above facts, stated:

> "* * * whenever the subject under consideration is one within the knowledge of experts, only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the Court nor the jury can disregard such evidence of experts, but on the other hand they are bound by such evidence even if it is contradicted by nonexpert witnesses. * * * Testimony of probative value sufficient to support applicant's claim is entirely lacking. No expert witness has expressed an opinion that it is even

> reasonably probable that the condition of applicant was due to his employment, and an award may not be predicated upon a possibility which is 'merely surmise and conjecture.' "

In the instant case, the evidence showed that the employee worked 16 to 18 hours a day and there was also evidence of likely sources of infection, in fellow employees with whom he came in contact and with the natives. Where an employee is sent by his employer to foreign lands, and particularly where, as here, the employer practically was in control of the employee's entire day, and provided the barracks in which the employee lived and slept, he is not required to show that he came in contact with the germ which produced the disease, during *actual working hours. Lepow v. Lepow Knitting Mills, supra,* 288 N. Y. 377, 43 N. E. (2d) 450 (1942). Cf. *Arquin v. Industrial Commission, supra,* 349 Ill. 220, 181 N. E. 613 (1932.) Even the California State courts concede that, where an employee is sent by his employer to foreign lands and there contracts a contagious or infectious disease, which is prevalent, he is not required to show that the germ entered his system during working hours. See *Fidelity & Casualty Co. of New York v. Industrial Accident Commission of California,* 84 Cal. App. 506, 258 P. 698 (1927.) Assuming *arguendo,* that the conditions of claimant's employment had been such that at the end of his day's work, claimant had gone to his own home and not to a barracks provided by his employer as part of the employment agreement and had contracted a disease under such

circumstances, it would not have been necessary for him to prove with absolute certainty that he contracted the disease during working hours. A higher or greater degree of proof is not nor should be required in compensation cases. In the case of *City and County of San Francisco v. Industrial Accident Commission,* 183 Cal. 273, 191 P. 26, where a hospital steward contracted influenza during the epidemic of 1918 and it was not proven with certainty whether he contracted it at the hospital where he was employed or at his home or elsewhere, the Court after calling attention to evidence from which it could be found that it was more probable that he contracted the disease at the hospital said:

> "It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. *But certainty is not required.* It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the Commission did. This we cannot say in the present case."

This quotation was repeated and approved in *Pacific Employers Insurance Company v. Industrial Accident Commission,* 19 Cal. (2d) 622, 122 P. (2d) 570. Compare *DeStefano v. Alpha Lunch Company of Boston, supra,* 308 Mass. 38, 30 N. E. 827 (1941) where the employee contracted trichinosis from meals eaten

outside of working hours, but as part of the employment agreement and therefore incidental to the employment. The Act does not provide for compensation for injuries which arise out of and in the course of the "work" but which arise out of and in the course of the "employment." Though the claimant ceased work at the end of each day, he did not terminate his employment. *Lamm v. Silver Falls Lumber Co.,* (not reported in State reports), 286 P. 527 (Or. 1930.) His contact with the natives, both in connection with the work and otherwise, his daily trips to the hospital in connection with his work as steward, his contact with his fellow employees on the boat en route to the Samoan Island and after arrival, both at work and in the barracks, were all risks which he encountered *because* of his employment, not merely *during* the employment. *Hartford Accident and Indemnity Co. v. Cardillo, deputy commissioner,* 112 F. (2d) 11, 14 (App. D. C. 1940.) The "bunk house" rule is as applicable in this case as in case of injury on the premises.

Appellants state, in effect, that exhaustion and overwork were not peculiar to claimant's employment; that they are incidents of all occupations in which physical work or long hours or both are demanded of the employees, and presumably, that any disability resulting from such exhaustion or overwork is not compensable. No authorities are cited by appellants in support of their statement. There is, however, authority *decidedly to the contrary* and under the

same Act which was applied in the present case: see *Hoage, deputy Commissioner v. Royal Indemnity Company,* 90 F. (2d) 387 (App. D. C. 1937.)

II.

AN ALTERNATIVE EVIDENTIARY FINDING, EITHER ALTERNATIVE OF WHICH WILL SUPPORT AN ULTIMATE FINDING, IS PROPER.

Appellants contend that because the deputy commissioner found that claimant either contracted a new infection or reactivated an old one, the finding was objectionable and for that reason the case should be remanded to the deputy commissioner to make an election between the alternatives. Where either alternative would support an award it is not necessary to make an election, and the finding may be stated in the alternative. *Zionek v. Glen Alden Coal Co.,* 105 Pa. Super. 189, 160 A. 154 (1932); *California Shipbuilding Corporation v. Industrial Accident Commission,* (not reported in State reports), 149 P. (2d) 432 (Cal. 1944.) It is only where one of the alternative findings would not support an award, that such alternative finding is insufficient. Of such character was the case of *Greenberg v. Greenberg,* 193 App. Div. 574, cited by appellants.

In the instant case, either finding would support the award and therefore an election is not required.

CONCLUSION.

In the concluding paragraphs of appellants' brief sympathy is expressed for claimant in his "unfortunate condition." It is believed that the more modern conception of duty to an employee who becomes disabled in and by reason of his employment is to go beyond a mere expression of sympathy. He should be taken care of until his disability is terminated and he is able to return to employment, and that is what the Act was intended to accomplish.

The deputy commissioner has found from the evidence that claimant's disability is causally related to his employment. It is respectfully submitted that the order and judgment of the court below dismissing the complaint was proper and should be affirmed.

Dated, San Francisco,
March 16, 1945.

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